

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES T. CARROLL, JR.
Claimant

VS.

THE BOEING COMPANY - WICHITA
Respondent

AND

AETNA CASUALTY & SURETY
Insurance Carrier

AND

WORKERS COMPENSATION FUND

Docket No. 177,033

ORDER

The respondent and insurance carrier request review of the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on March 7, 1995. The Appeals Board heard oral argument on August 14, 1995.

APPEARANCES

Claimant appeared by his attorney, Chris Clements of Wichita, Kansas. The respondent and insurance carrier appeared by their attorney, Eric K. Kuhn of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Becky C. Hurtig of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Special Administrative Law Judge.

Stipulations

The stipulations of the parties are listed in the Award of the Special Administrative Law Judge and are adopted by the Appeals Board for this review.

Issues

The Special Administrative Law Judge awarded claimant permanent partial disability benefits based upon a twenty-three percent (23%) work disability, and assessed all of the liability against the respondent. The respondent and its insurance carrier requested this review and raised the following issues:

- (1) Whether claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent.
- (2) The nature and extent of disability, if any.
- (3) The liability of the Workers Compensation Fund, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Special Administrative Law Judge should be modified to award claimant permanent partial disability benefits based upon a thirty-three and one-half percent (33.5%) work disability.

(1) The Appeals Board finds claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent on March 12, 1993. On that day claimant developed cramps in his back while shooting rivets. With the help from co-workers, claimant was immediately taken to respondent's medical department for treatment.

(2) As a result of this work-related accident, claimant has sustained permanent injury which constitutes a functional impairment of five percent (5%) to the body as a whole. This finding is based upon the medical records of both Ernest R. Schlachter, M.D., who saw claimant at claimant's attorney's request, and board certified orthopedic surgeon Robert A. Rawcliffe, M.D., who evaluated claimant at the request and order of the Administrative Law Judge. Dr. Schlachter diagnosed claimant's injury as chronic lumbosacral sprain and believes claimant should observe the permanent restrictions of no repetitive lifting of more than forty (40) pounds, and no single lifts of more than fifty (50) pounds. Dr. Rawcliffe examined claimant on July 5, 1994, and diagnosed a lumbosacral sprain/strain and believes claimant may lift up to fifty (50) pounds occasionally, may lift up to twenty-five (25) pounds frequently, but should avoid frequent bending or stooping. Dr. Rawcliffe believes that with appropriate medical treatment, claimant's impairment and restrictions might be reduced or removed. We note that Dr. Rawcliffe examined claimant almost one (1) year and four (4) months after the accident and, therefore, believe claimant's symptoms are permanent in nature and will continue into, at least, the foreseeable future.

Because his is a "non-scheduled" injury, claimant is entitled permanent partial disability benefits based upon K.S.A. 1992 Supp. 44-510e. The statute provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Appeals Board finds claimant has sustained a work disability of thirty-three and one-half percent (33.5%). This finding is based upon a consideration of both claimant's loss of ability to perform work in the open labor market and his loss of ability to earn a comparable wage. The presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e is not applicable because claimant, due to a lay off, did not return to work for the respondent when released to return to work by his physician and has not found other employment paying comparable wages.

Claimant's labor market expert, Jerry D. Hardin, testified that claimant has lost fifteen to twenty percent (15-20%) of his ability to perform work in the open labor market considering the restrictions of Dr. Schlachter and thirty to thirty-five percent (30-35%) of this same ability considering the restrictions of Dr. Rawcliffe. Respondent's labor market expert, Karen Crist Terrill, testified claimant has lost twelve percent (12%) of his ability to perform work in the open labor market considering the restrictions of Dr. Schlachter and eighteen percent (18%) considering the restrictions of Dr. Rawcliffe.

Regarding loss of ability to earn a comparable wage, Mr. Hardin testified claimant has sustained a fifty-six percent (56%) loss. He believes claimant retains the ability to earn \$330.00 per week. His opinion that claimant has sustained a fifty-six percent (56%) loss is based upon a comparison of \$330.00 to \$766.75, which is the amount he believed claimant was earning on the date of accident. Comparing the \$330.00 figure to the actual average weekly wage of \$831.10 (as found by the Special Administrative Law Judge and adopted by this Board) yields a loss of approximately sixty percent (60%).

Ms. Terrill testified claimant retains the ability to earn \$400.00 per week and comparing that figure to \$637.60, which is the amount she believed claimant was earning on date of accident, yielded a thirty-seven percent (37%) loss of ability to earn a comparable wage. Comparing the \$400.00 figure to the actual average weekly wage of \$831.10 yields a loss of fifty-two percent (52%).

Both labor market experts agree that claimant would neither have a loss of ability to perform work in the open labor market nor loss of ability to earn a comparable wage if Dr. Lesko's opinions are true that claimant's low back condition has resolved and claimant has no impairment or restrictions.

Depending upon which expert opinion is considered, claimant's loss of ability to perform work in the open labor market ranges from zero to thirty-five percent (0-35%) and his loss of ability to earn a comparable wage ranges from zero to sixty percent (0-60%). After considering the entire record, the Appeals Board affirms and adopts the finding of the Special Administrative Law Judge that claimant has sustained a loss of eleven percent (11%) of his ability to perform work in the open labor market as it falls within the range of loss as set forth above and appears reasonable in light of claimant's residual functional abilities. The Appeals Board also finds claimant's loss of ability to earn a comparable wage is fifty-six percent (56%), and the approximate average between the losses determined by comparing the weekly wage estimates of claimant's post injury wage-earning ability to the correct average weekly wage figure.

The Appeals Board is not required to give equal weight to loss of access to the open labor market and loss of ability to earn a comparable wage. See *Schad v. Hearthstone Nursing Center*, 16 Kan. App. 2d, 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this case there appears no compelling reason to give either factor greater weight and, accordingly, they will be weighed equally. The result is an average between the eleven percent (11%) loss of ability to perform work in the open labor market and the fifty-six percent (56%) loss of ability to earn a comparable wage resulting in a work disability of thirty-three and one-half percent (33.5%) which the Appeals Board considers to be an appropriate basis for the award in this case.

Should claimant's injury improve, because of either the natural healing process or the appropriate medical treatment as suggested by Dr. Rawcliffe, the parties may request review and modification as permitted by the Workers Compensation Act.

(3) The Appeals Board finds that the Workers Compensation Fund is not responsible for any portion of this Award.

Under K.S.A. 44-566 and K.S.A. 1992 Supp. 44-567, before the Fund can be found liable for a portion or the entirety of an award, the respondent must prove it either hired or retained claimant in its employment with knowledge that claimant had a physical or mental impairment that constituted a handicap in obtaining or retaining employment. As a result of the March 1993 accident, claimant sustained permanent injury to his low back in the area of the lumbar spine. The evidence fails to establish that claimant, prior to March 1993, had any impairment to his low back that would constitute a handicap in obtaining or retaining employment. In fact, claimant testified he had no prior back trouble.

Respondent argues the Workers Compensation Fund is liable for the entirety of any award entered in this proceeding on the basis that claimant aggravated his back either in April 1993 when he allegedly experienced increased pain due to a cramp while bending over, or in May 1993 when claimant allegedly fell and twisted his back. The respondent argues that these alleged subsequent aggravations would not have occurred "but for" the initial March 1993 accidental injury. The Appeals Board finds respondent's argument to be without merit and without support in the evidentiary record. There is neither evidence that these alleged events resulted in either permanent aggravation or injury, nor evidence that any of claimant's functional impairment was related to either of these events.

The Appeals Board affirms the finding of the Special Administrative Law Judge that the Workers Compensation Fund has no liability in this proceeding.

(4) The Appeals Board adopts the findings and conclusions of the Special Administrative Law Judge that are not inconsistent with the findings and conclusions specifically set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on March 7, 1995, should be, and hereby is, modified to award claimant permanent partial disability benefits based upon a thirty-three and one-half percent (33.5%) work disability.

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR of the claimant, James T. Carroll, Jr., and against the respondent, The Boeing Company - Wichita, and its insurance carrier, Aetna Casualty & Surety, for an accidental injury sustained on March 12, 1993, and based on an average weekly wage of \$831.10 for 9 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$2,691.00, followed by 406 weeks of permanent partial disability compensation at the rate of \$185.62 per week or \$75,361.72 for a 33.5% work disability making a total award of \$78,052.72.

As of September 8, 1995, there is due and owing claimant 9 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$2,691.00, followed by 121 weeks of permanent partial disability compensation at the rate of \$185.62 per week in the sum of \$22,460.02, for a total of \$25,151.02 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$52,901.70 is to be paid for 285 weeks at the rate of \$185.62 per week, until fully paid or further order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the Director. Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

All compensation, medical expenses and administrative costs are to be borne wholly by the respondent and none by the Kansas Workers Compensation Fund.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed to the respondent to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates Transcript of Regular Hearing	\$158.55
Ireland Court Reporting Deposition of Bradley W. Bruner, M.D.	\$124.08
Alexander Reporting Co. Deposition of Jerry D. Hardin	\$220.80
Deposition Services Deposition of Karen Crist Terrill	\$144.20

IT IS SO ORDERED.

Dated this ____ day of September, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Wichita, Kansas
Eric K. Kuhn, Wichita, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director

Please review finding of work disability. The majority voted to find 11% loss of market and 56% wage loss. The 11% loss was Morrissey's figure, but he missed Hardin's opinion because it was different than his report and was, therefore, unaware of market loss considering the restrictions of Rawcliffe. Also, Morrissey had the wrong # for market loss when considering Schlachter.

Please feel free to add to rationale.

KW